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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/552,586	04/19/2000	Michael Kochman	181/01332	4080

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EXAMINER

HWANG, VICTOR KENNY

ART UNIT	PAPER NUMBER
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3764

19

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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 09/552,586
Filing Date: April 19, 2000
Appellant(s): KOCHMAN ET AL.

Allan C. Entis
For Appellant

EXAMINER'S ANSWER

MAILED
SEP 21 2004
GROUP 3700

This is in response to the appeal brief filed February 23, 2004.

(1) *Real Party in Interest*

A statement identifying the real party in interest is contained in the brief.

(2) *Related Appeals and Interferences*

A statement identifying the related appeals and interferences which will directly affect or be directly affected by or have a bearing on the decision in the pending appeal is contained in the brief.

(3) *Status of Claims*

The statement of the status of the claims contained in the brief is correct.

(4) *Status of Amendments After Final*

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) *Summary of Invention*

The summary of invention contained in the brief is correct.

(6) *Issues*

The appellant's statement of the issues in the brief is correct.

(7) *Grouping of Claims*

The rejection of claims 48-50 stand or fall together because appellant's brief does not include a statement that this grouping of claims does not stand or fall together and reasons in support thereof. See 37 CFR 1.192(c)(7).

(8) Claims Appealed

Claim 50 (numbered as 52) contains substantial errors as presented in the Appendix to the brief. Accordingly, claim 50 is correctly written in the Appendix to the Examiner's Answer.

(9) Prior Art of Record

6,017,320	BLEEKER ET AL.	1-2000
5,336,159	CHENG	8-1994
4,086,922	HENDERSON	5-1978

(10) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claims 48-50 are rejected under 35 U.S.C. 103(a) as being unpatentable over *Bleeker et al.* (US Pat. 6,017,320) in view of *Cheng* (US Pat. 5,336,159). *Bleeker et al.* discloses a massage apparatus comprising a housing 2 and at least one massaging element 30,31 rotatable within the housing and extending from the housing so that at least one massaging element can be positioned to manipulate a region of a person's skin 39 and underlying cellulite tissue when the apparatus is applied to the region. A vacuum pump 67 generates a low pressure region within the housing operative to draw the region of skin and underlying cellulite towards the housing when the apparatus is applied to the region.

Bleeker et al. does not disclose the massaging apparatus comprising a radiant heat source mounted to the housing that provides radiant heat operative to heat the cellulite tissue when the apparatus is applied to the region (claim 48); the radiant heat characterized in that it

substantially passes through skin (claim 49); and the radiant heat comprises light having wavelength in the range from 600 nm to 1500 nm (claim 50).

Cheng discloses a massage apparatus comprising infrared devices to produce heat for stimulating the muscles as the muscles are massaged by motor-operated massaging devices (col. 1, lines 5-9). The infrared device 3 comprises a plurality of infrared light emitting elements 32 mounted to a circuit board (col. 1, lines 55-57) operatively mounted to the casing 1 of the massage apparatus. The infrared device or devices produce infrared radiant heat that is operatively transmitted to the at least the underlying muscles and joints (col. 2, lines 25-32). This would mean that the radiant heat substantially passes through the skin. The infrared range within the electromagnetic spectrum falls within the frequency range of 1 mm to 750 nm. This is well within the range of 600 nm to 1500 nm claimed by appellant.

It would have been obvious to one having ordinary skill in the art at the time the invention was made to provide the massaging apparatus of *Bleeker et al.* with the radiant heat source of *Cheng*, since *Cheng* teaches that infrared devices produce heat for stimulating muscles as the muscles are massaged by motor-operated massaging devices (col. 1, lines 5-9).

(11) Response to Argument

In response to appellant's argument that a *prima facie* case of obviousness has not been made with respect to claim 48, the examiner disagrees. All of the limitations of appellant's claimed invention are found in the *Bleeker et al.* and *Cheng* references. See the above obviousness rejection.

In response to appellant's argument that the support statement in the final Office action does not rise to support *prima facie* obviousness, the examiner disagrees. One having ordinary

skill in the art at the time the invention was made would recognize that radiant heat sources, such as that taught by *Cheng*, enhance massaging effect. The examiner indicated in the rejection that a radiant heat source would **enhance the massaging effect**. *Cheng* discloses in the first sentence of the disclosure that heat stimulates the muscles as the muscles are massaged by motor-operated massaging devices (col. 1, lines 5-9).

In response to appellant's argument that only *Henderson* describes a massager for treating cellulite and that combination with *Bleeker et al.* and/or *Cheng* cannot be supported because they are intended for different treatments, *Henderson* was first cited in the Response to Arguments section of the Final Office action as further evidence that it is well known in the massage art to provide massage apparatus with radiant heat sources. As noted, *Henderson* is not cited in the formal rejection.

Appellant also argues that *Henderson* does not teach use of radiant heat for the purpose of treating cellulite (page 4 of Brief, last paragraph). Presumably, appellant is arguing that the heat used for treating cellulite as taught by *Cheng* is a heat transmitted by convection and not heat that is radiated. The heating elements 25 of *Henderson* are suitably supported under the lower surface 6 of the base member 3 near the upper portions of the balls 2 with the elements being arranged to substantially uniformly heat the area under the base member to thereby uniformly heat the balls (col. 3, lines 51-57). It is the examiner's interpretation that the heating elements are radiating heat that warms the area under the base member that in turn radiantly heats the balls. The heating elements or the base member can be considered a radiant heat source. The balls then transfer heat by conduction to the person's skin surface and in turn to underlying cellulite tissue. This interpretation would satisfy the limitation of "a radiant heat

source...that provides radiant heat operative to heat cellulite tissue when the apparatus is applied to the region.”

In response to appellant’s argument that *Henderson* teaches away from the combination of radiant heat with a vacuum device, *Henderson* is merely used as evidence that it is well known in the massage art to provide massage apparatus with radiant heat sources. *Henderson* does not teach away from the combination of radiant heat and vacuum, but supports the obviousness conclusion that providing heat to a massage apparatus is well known and old in the massage art to enhance the massaging effect.

In response to appellant’s argument that the combination of *Bleeker et al.* and *Cheng* is not obvious because they are intended for different treatments and respectively teach use of radiant heat and vacuum for different purposes, *Bleeker et al.* does not appear to limit itself in any way to any particular purpose for use of its massage apparatus. There is no limitation found in the disclosure to lead one of ordinary skill in the art to conclude that the massage apparatus could not be used for massage of muscles and joint, such as the apparatus of *Cheng*.


For the above reasons, it is believed that the rejections should be sustained.

APPENDIX – Claims Appealed

50. The massaging apparatus of claim 49 wherein said radiant heat source provides radiant heat having a wavelength in the range of 600 nm to 1500 nm.

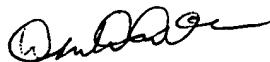
Art Unit: 3764

Respectfully submitted,


Victor K. Hwang
September 16, 2004

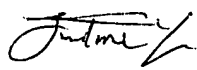
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